D.P.U. 88-DS-9

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by Fiore and Zenone, Inc.

APPEARANCES: David J. Hopwood, Esq.
31 Channing Street
Newton, Massachusetts 02158
FOR: FIORE AND ZENONE, INC.
Respondent

Robert Smallcomb
Division of Pipeline Engineering and Safety
Department of Public Utilities
100 Cambridge Street
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE ENGINEERING AND SAFETY

I. INTRODUCTION

On June 29, 1988, the Pipeline Safety and Engineering Division ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Fiore and Zenone Inc. ("Respondent" or "Zenone"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on April 1, 1988, at 2 Clifton Road and 124 Weybosset Road in Methuen, Massachusetts, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions or maintaining markings, causing damage to an underground pipe operated by Bay State Gas Company ("Bay State" or "Company").

On August 1, 1988, an informal hearing was held at the Department. In a letter dated September 6, 1988, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. In that decision, the Division found that regardless of whether the operator of the equipment which caused the damage had violated internal safety policies of the Respondent, that operator was still an employee of the Respondent, and as such, the Respondent was liable for the actions of that employee.

On October 7, 1988, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, adjudicatory hearings were held on the dates of December 16, 1988 and January 26, 1989 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. Robert Smallcomb, a public utilities engineer with the Department, represented the Division. Raymond Roy, a distribution lead operator for Bay

State, testified for the Division. Also testifying for the Division the Division were Richard Woodburn, an engineering assistant for Bay State, and Henry Cappuccio, a public utilities engineer for the Department. The Division presented five exhibits. David Hopwood, Esquire, represented the Respondent. Testifying for the Respondent was James Zenone, chief officer for Zenone. The Respondent presented one exhibit.

Both parties agreed that the alleged Dig-Safe violations at 2 Clifton Road and 124 Weybosset Road, in Methuen, occurred under the same circumstances and offered little testimony to separate the two alleged violations (Tr. 2, at 114-118). Accordingly, the Department's decision will apply equally to both incidents.

II. MOTION TO DISMISS

On February 28, 1989, the Respondent filed a motion to dismiss. In that motion, the Respondent cited the following reasons in support of its motion: (1) a witness for the Division, Mr. Roy, offered testimony in direct opposition to documented evidence offered by the Division; (2) evidence presented by the Division failed to support the allegations contained in the NOPV; and (3) the Division failed to provide substantial evidence that showed the Respondent had caused the breaks in the line.

220 C.M.R. § 1.06(6)(e) allows for a party to move for dismissal of "all issues or any issue in [a] case" at any time after the filing of an initial pleading. The Department's current standard for ruling on a motion to dismiss for failure to state a claim upon which relief can be granted was articulated in Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27 (1988). In Riverside, we denied the respondent's motion to dismiss, finding that it did not "appear[] beyond

doubt that [the petitioner] could prove no set of facts in support of its petition," and, in so doing, adopted M. R. Civ. p. 12(b)(6). Id.; see also Nader v. Citron, 372 Mass. 96, 98 (1977).

In making its determination on whether to grant a motion to dismiss, the Department must take the facts included in the filing and pleadings as true and in the light most favorable to the non-moving party. Id. Dismissal will be granted by the Department only if it appears to a certainty that the non-moving party is entitled to no relief under any statement of facts that could be proven in support of its claim. Riverside, supra, at 26-27.

The Division made allegations pertaining to a lack of reasonable precautions and failure to maintain markings (Tr. 1, at 8-9; Exh. D-1). In support of its allegations, it presented a witness who had visited the site, and exhibits and testimony showing damage to an underground Company facility (Tr. 1, at 10; Exhs. D-1, D-2) The Division also presented testimony that the initial markings were accurate (Tr. 1, at 15, 18-19).

Therefore, in the instant proceeding, after a careful review of the entire record, the Department finds that the Respondent has not sustained its burden of demonstrating that it appears to a certainty that the non-moving party (Division) has not shown a Dig-Safe violation to exist because all of its allegations were unsupported. Accordingly, the Respondent's motion to dismiss is hereby denied.

III. SUMMARY OF FACTS

A. The Division's Position

In the underground damage reports offered by the Division, Bay State alleged that the Respondent damaged Company service lines and did not maintain the Company's Dig-Safe

markings or take reasonable precautions to avoid damage to those facilities (Tr. 1, at 8; Exhs. D-1, D-2). The Division's witness, Mr. Roy, testified that the Respondent had contacted Bay State to report the gas break (Tr. 1, at 13-14). Mr. Roy contended the Respondent was installing a manhole when it damaged Bay State's facility (id. at 14). He testified that the when he arrived at the site, the service line had been pulled out of the main line, causing him to replace the damaged service line with a new line (id. at 8, 10, 61-62). Mr. Roy testified that the area surrounding the broken facility was clearly marked by the Company before being removed by the Respondent during excavation (id. at 15, 18-19).

A second Company witness, Mr. Woodburn, testified that the Company generally used the "corridor" method of marking its underground utilities in which markings were placed 18 inches from the location of the utility on both sides (Tr. 2, at 96). Mr. Roy testified that although the asphalt and the markings that they contained had been removed by the Respondent prior to excavation, Company markings indicating the location of the service still existed on a curb cock on private property (Tr. 1, at 15-16, 22). Mr. Roy also testified that although the original Company street markings were not maintained by the Respondent, it still should have been able to locate the service line with the marking on the curb cock (id. at 18-19, 57-58).

Mr. Smallcomb contended that after the Company's markings were removed by the Respondent, it should have called the Company for a remarking (id. at 23). Mr. Smallcomb further stated that if the Respondent had taken care when it was maintaining the Company's markings, the service line would not have been broken (Tr. 2, at 125).

B. The Respondent's Position

Mr. Zenone testified that he obtained his knowledge of the incident from the foreman and other employees of the Respondent (Tr. 1, at 25, 33). Mr. Zenone stated that the damaged utility was a Company service line which had been pulled out of the main line by the "bucket" of the Respondent's excavating machine (id. at 33). Mr. Zenone further stated that the Respondent generally "stripped" the pavement and dug the excavation with the same backhoe (Tr. 2, at 79).

Mr. Zenone testified that during sewer installations, the Respondent routinely begins checking for underground facilities approximately two feet before the marked location of company facilities (Tr. 1, at 27). According to Mr. Zenone, in the instant case, the Respondent struck the facility just prior to the two-foot distance at which it normally begins checking, by hand, for the exact location of the facility (id. at 27, 30).

Mr. Zenone testified that prior to reaching the two-foot distance, as the Respondent approaches a company's markings, it begins excavating in one-foot deep intervals (Tr. 1, at 35-36; Tr. 2, at 76, 86). Mr. Zenone indicated that the reason the Respondent was using "heavy" equipment when it broke the facilities was because the Respondent had not anticipated the service lines being more than two feet away from the marking line their marked location (Tr. 1. at 29-30, 35-36). He further stated that in the instant case, the "stripping" of the pavement could not be done by hand (id. at 39).

Mr. Zenone stated that the initial markings made by the Company were inaccurate because the service line which those markings were intended to locate was positioned outside the boundaries of those markings (Tr. 1. at 26, 33, 36; Tr. 2. at 85). He maintained that the excavators responsibility was to locate the facilities using marks laid by the Company and then

mark the hidden actual remainder of those facilities (Tr. 1, at 32).

Mr. Zenone stated that the Respondent routinely removed Company markings during excavation, but noted that the period of time between that removal and the breaking of the facility was insignificant (id. at 26, 33). Mr. Zenone testified that the Respondent was aware of the regulatory requirement for excavators to notify Dig-Safe for a re-mark when there was doubt regarding the location of underground facilities (Tr. 1, at 31; Tr. 2, at 89). He contended that if the Respondent left the excavation site for a significant period of time, it would maintain company markings (Tr. 1, at 31-32; Tr. 2, at 80).

Mr. Zenone stated that it is common practice for the Respondent to call the Company for a remarking when it has "stripped" the asphalt off an entire street, but not in a situation when the Respondent had recently removed a company's marking and remembered the position of those markings (Tr. 1, at 30-32). He contended that in the instant case, the Respondent did not maintain the Company's markings because its employees remembered the location of those markings and because the Respondent did not leave the site for a significant period of time (Tr. 1. at 30, 39; Tr. 2. at 87-88).

Mr. Zenone stated that the Respondent had "generally tried to keep an eye on [where] the services [were during the excavation]" (Tr. 2, at 87, 88). He also maintained that on all projects involving sewer installations, as in the instant case, the Respondent designates a foreman to watch all excavation with the express purpose of averting damage to underground facilities (id. at 75).

IV. STANDARD OF REVIEW

In considering whether reasonable precautions were used by the Respondent in its

excavation, the Dig-Safe Law, in pertinent part, states:

> Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way,...including but not limited to, any substantial weakening of structural or lateral support of such pipe,...penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc. v. Bay State Gas Co., D.P.U. 89-DS-15 (1990); Petricca Construction Company v. Berkshire Gas Company, D.P.U. 88-DS-31 (1990). John Mahoney Construction Co. v. Boston Gas Company, D.P.U. 88-DS-45 (1990); Northern Foundations, Inc. v. Berkshire Gas Company, D.P.U. 87-DS-54 (1990). However, in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp. V. Commonwealth Gas Company, D.P.U. 91-DS-2 (1992). Further, in situations where markings are clear, it is the excavator's responsibility to be cognizant of the risks in excavating and to adopt an excavating method that is reasonable given the circumstances. Mahoney, supra.

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating v. Commonwealth Gas Company, D.P.U. 89-DS-116 at 9 (1993); Fed. Corp. v. Commonwealth Electric Company, D.P.U. 91-DS-2 at 5-6

(1992). In addition, the mere fact that a utility was damaged during an excavation does not by itself constitute a violation of the statute. Yukna v. Boston Gas Company, 1 Mass. App. Ct. at 62 (1973). In specific instances where there has been an allegation of failure to exercise reasonable precaution without demonstrating any precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro v. Boston Gas Company, D.P.U. 91-DS-4 (1992); Fed. Corp. v. Commonwealth Electric Company, D.P.U. 91-DS-2 (1992); Albanese Brothers, Inc. v. Colonial Gas Company, D.P.U. 88-DS-7 (1990).

G.L. c. 82, § 40 also states:

> After a company has designated the location of such pipes, mains wires an conduits at the locus of the excavation in accordance with the provisions of this section, the excavator shall be responsible for maintaining the designation markings at such locus, unless the said excavator requests re-marking at the locus due to obliteration, destruction or other removal of such markings and the company shall then have twenty-four hours following the receipt of such request to remark such locus.

The Department has consistently found that excavators are responsible for maintaining utility designation markings. Linden Construction Company, D.P.U. 87-DS-149 (1991). The responsibility attaches after the utility companies have marked the location of their underground facilities at the excavation site named in the Dig-Safe request. Warner Bros., Inc., D.P.U. 87-DS-124 (1990). The Dig-Safe Law states that excavators must call for a remarking if markings are no longer visible or have been inadvertently moved. Lachance Excavating Company, Inc., D.P.U. 87-DS-178 (1990). Even in circumstances where no damage occurs, the failure of an excavator to maintain markings is considered a violation of the Dig-Safe Law.

Warner Bros. Inc., supra.

V. ANALYSIS AND FINDING

The main issues in this case pertain to whether the Respondent (1) failed to use reasonable precautions, and (2) did not maintain markings at the sites of 2 Clifton Road and 124 Weybosset Road, in Methuen, Massachusetts.

The Respondent damaged the facility in question when the bucket of an excavating machine came into contact with a service line. While the Respondent testified that it could not remove the top layer of road by hand, it failed to demonstrate why hand-digging could not be used in this instance to expose and locate the underground facility. Instead, the Respondent alleged that the damaged facility was located outside the Companies markings, and therefore, those markings were inaccurate and prevented the Respondent from taking the precautions it normally took. The Respondent testified that it routinely starts to check for underground facilities by hand, approximately two feet from their marked locations.

Mr. Zenone's direct testimony concerning the excavation and markings at the site were based on conversations with third parties, and not on personal observations.[1] At no time did Mr. Zenone testify that he had visited the site in question. The Respondent also did not introduce evidence, such as pictures or sworn statements from eye-witnesses, to support its contention that the markings were inaccurate.

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[1] Therefore, much of his testimony is hearsay. While hearsay evidence is not incompetent under G.L. C. 30A § 11(2) or under the Department's own regulations, 220 C.M.R. 1.10, one could, nonetheless, argue that the legal residuum rule precludes an administrative agency's reliance on hearsay alone (that is, hearsay un-corroborated by evidence that would be competent in a court of law) to meet the substantial evidence test of G.L. c. 30A, §§ 1(6) and 14(7). See Boston Gas Company, D.P.U. 86-DS-160 at 6 (1990).

In comparison, the Division presented a witness who had visited the site in question, and prepared the Company's underground damage report. This witness testified that the Company's markings had been properly placed, and that at the time of the damage, Company markings still existed on the site which correctly indicated the location of the service line. In the absence of substantial evidence to the contrary, the Department finds that the Company markings were accurate.

Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc. v. Bay State Gas Co., D.P.U. 89-DS-15 (1990); Petricca Construction Company v. Berkshire Gas Company, D.P.U. 88-DS-31 (1990). John Mahoney Construction Co. v. Boston Gas Company, D.P.U. 88-DS-45 (1990); Northern Foundations, Inc. v. Berkshire Gas Company, D.P.U. 87-DS-54 (1990). The Department finds that, because the Respondent did not take adequate steps to protect

the underground facilities, such as hand-digging to expose the facility after stripping the top layer of asphalt, the Respondent failed to take reasonable precautions in excavating at both 2 Clifton Road on April 1, 1988 and 124 Weybosset Road on April 22, 1988 in Methuen, Massachusetts, and was in violation of the Dig-Safe Law.[2]

In addressing the final issue of whether the Respondent maintained the Company's marking

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[2] The Department recommends that, whenever possible, excavators locate marked underground facilities by hand-digging before performing excavation on other parts of the excavation site.

properly, a significant period of time did not pass between the removal of the markings and the excavation that damaged the facility. In addition, the Respondent did not leave the site for a significant period of time. Further, Company markings that showed the location of the service line still existed after damage had occurred to that service line. Accordingly, the Department finds that the Division did not present substantial evidence to support its allegation that the Respondent failed to maintain the Company's markings on the site in question, and that the Respondent is not in violation of the Dig-Safe Law for a failure to maintain company markings.

VI. ORDER

Accordingly, after due notice, hearing and consideration, the Department

FINDS: That Fiore and Zenone Incorporated violated the Dig-Safe Law when it failed to use reasonable precautions in excavating on Clifton Road and Weybosset Road, in Methuen, on April 1, 1988 and April 22, 1988, respectively,[3] and it is

ORDERED: That this being the second offense, Fiore and Zenone Incorporated shall pay a civil penalty of $500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this Order.

By Order of the Department,

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[3] Because the Division did not address the damage at 2 Clifton Street and 124 Weybosset as separate incidents or in separate dockets, the Department will apply only one civil penalty against the Respondent.